

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 129 of 2024

IN THE MATTER of an Application under Order 113 of the *High Court Rules* 1988.

IN THE MATTER of an Application under section 169 of the *Land Transfer Act* 1971.

BETWEEN : **PHUL MATI** f/n Gobardhan of Koronivia, Nausori, Domestic Duties, as the Attorney for Durga Prasad f/n Gobardhan of Auckland, New Zealand, Dental Assistant vide Power of Attorney No. 22124.

PLAINTIFF

AND : **ALL OCCUPANTS AND TENANTS AND/OR FAMILY MEMBERS OF ANWAR ALI** of Lot 9 Nakaikogo, Nausori, property described as CT 32228 being Lot 1 on DP 8234 situate in the District of Rewa, Viti Levu.

DEFENDANTS

Counsels : **V.Kumar for the Plaintiff**
Legal Aid Counsel for the Defendant

Date of Hearing : **24th July 2024**

Date of Ruling : **13th December 2024**

JUDGMENT

A. Introduction

1. The Plaintiff, as the holder of a Power of Attorney for Durga Prasad, the registered proprietor of the property described as **CT No. 32228, Lot 1, DP No. 4257 situate in the District of Rewa**, filed an Originating Summons on 22nd April 2024 seeking;
 - (i) The Plaintiff do recover possession of premises situated at Lot 9, Lokia, Nakaikogo, Nausori, property described as CT 32228 being Lot 1 on DP No. 4257 situate in the District of Rewa in the island of Viti Levu on the ground that she is entitled to possession and that the person in possession are in possession without license or consent.
 - (ii) The time for the service of this Originating Summons and supporting affidavit be abridged.

B. Narration

2. In an affidavit filed in support of the Originating Summons, the Plaintiff deposes the following;
 - (i) That she is the Plaintiff in the action by virtue of a Power of Attorney No.22124, granted by her brother, Durga Prasad f/n Gorbadhan of Auckland, New Zealand, the registered proprietor of the property described as CT No. 32228, Lot 1, DP 4257 situate in the District of Rewa, Viti Levu (*hereinafter* the subject property);
 - (ii) Anwar Ali was initially given a license to occupy the subject property, who then brought his family and/or tenants and other persons unknown to the Plaintiff and not named in the Summons, to reside on the land and also constructed an electrical power line to obtain power supply from Energy Fiji Ltd.
 - (iii) After the expiration of the Defendant's license to occupy the Plaintiff gave him and all other occupants of the said property ample time to remove their possessions, power supply connections and to deliver vacant possession of the subject property as she intended to subdivide and develop the said land.
 - (iv) That 2 of the tenants who had license to occupy the subject property complied with the request to vacate.

- (v) The Defendant, Anwar Ali did not comply with the notice to vacate the premises and continue in possession as illegal occupants.
- (vi) That the Plaintiff's solicitors issued a Notice to Quit and Deliver Vacant Possession dated 23rd November 2023 against the said Defendant which was served on 21st November 2023.
- (vii) The Notice was received and not signed and left outside the premises and fixed on the property on an electricity post visible to all occupants
- (viii) The Defendant have continued to occupy the property despite being served with the said Notice and have been a nuisance and hindrance to the development plans of the Plaintiff.

C. The Law

- 3. Whilst the Originating Summons has been filed pursuant to Order 113 of the *High Court Rules 1988* and section 169 of the *Land Transfer Act 1971*, the primary focus of the Plaintiff is to elicit whether the summary process for possession under Order 113 is available to her on the facts of this case.
- 4. Order 113 is entitled 'Summary Proceedings for Possession of Land' and Rule 1 states;

Proceedings to be brought by originating summons

- 1. ***Where a person claims possession of land which he alleges is occupied solely by a person (not being a tenant or tenants holding over after the termination of the tenancy), who entered into or remained in occupation without his or her license or consent or that of any predecessor in title or his or hers, the proceedings may be brought by originating summons in accordance with the provisions of this Order***
- 5. The primary issue that the Court has to determine is whether the summary process for obtaining possession of land pursuant to Order 113 of the *High Court Rules 1988*, as sought in the Originating Summons filed on 22nd April 2024 is appropriate given the peculiar factual circumstance of this case.
- 6. The Plaintiff filed written submissions on 9th August 2024 to support its position that the orders it seeks in the Originating Summons pursuant to Order 113 be granted. It relies on authorities such as ***Baiju v Kumar*** [1999] FJHC 20 for directions on the ambit of Order 113;

- (i) Order 113 does not provide a new remedy, but rather a new **procedure** for the recovery of possession of land which is in wrongful occupation by trespassers.
- (ii) The application of the Order is narrowly confined to the claim for possession of land which is occupied solely by a person or persons who entered into or remain in occupation without the license or consent of the person in possession or of any predecessor of his.
- (iii) The exceptional machinery of the Order is plainly intended to remedy a situation where the occupier has entered into occupation without license or consent **and this Order also applies to a person who has entered into possession with a license but has remained in occupation without a license ...**
- (iv) The order normally applies in virtually uncontested cases or in clear cases where there is no issue or question to try, i.e. where there is no reasonable doubt as to the claim of the Plaintiff to recover possession of land or as to wrongful occupation on the land without license or consent and without any right, title or interest.

7. Whilst the Court finds the obiter comments in **Baiju** helpful, it also finds it practical to refer to a series of cases from the High Court in Lautoka,¹ on the ambit and application of Order 113 in identifying certain propositions to consider when determining whether the summary procedure provided by the Order is appropriate for application to a particular factual matrix;

- (i) ***It is necessary for the Plaintiff to show that there is no basis upon which the occupier/defendant is entitled to remain on the property (eg; the right of occupation has been terminated-NLTB v Veisamasama-HBC No 34 of 2011);***
- (ii) ***If the Plaintiff cannot do so, or if there is a factual dispute about the effectiveness of the termination or if there is some other alleged basis for occupation which is contentious, an application for Order 113 will probably be not appropriate.***
- (iii) ***When it comes to the Defendant's opposition under Order 113, the burden of showing that they have a case that justifies refusing the Plaintiff's summary application is not particularly high, if it is based on a factual dispute. The summary nature of the jurisdiction is not suited to resolving contested issues of fact requiring evidence, cross examination etc.***

¹ ***Kant v Nair*** –Civil Action No.163 of 2020; ***Nadhan v Reddy***-Civil Action No.HBC 131 of 2016; ***ILTB v Webb & 7 Others*** –Civil Action No. HBC 271 of 2019

- (iv) ***Due to the summary nature of an application under Order 113 and because of the wording of the rule itself, the court does not embark on an assessment of the balance of convenience. If the Defendant is able to present evidence and/or argument that reaches the serious question level (neither frivolous or vexatious) as to both fact and law, he is entitled to have the application under Order 113 dismissed, so that the Plaintiff pursues his application for possession in ordinary proceedings where the issues raised can be properly explored and decided.***

D. Analysis

- 8. Whether the Court, in the exercise of its discretion ought to grant the orders sought in the Originating Summons pursuant to Order 113 of the *High Court Rules 1988*?**
- 9.** The issues of contention raised by the Defendant² in an Affidavit in Opposition are as follows;
- (i) That he began occupying the subject property in January 2010, after purchasing the subject property from an Eremasi Tasova, a former tenant of the Plaintiff.
 - (ii) The Plaintiff gave the Defendant consent to occupy the subject property for a term of 30 years, at a rental sum of \$100 per year, with a goodwill payment of \$1000 to be payable in instalments from 2010-2016. The agreement was not evidenced in writing despite request that this be provided by the Plaintiff.
 - (iii) The Plaintiff consented to 10 other persons to occupy the subject property.
 - (iv) The Plaintiff had given written consent on 10th October, 2010 for the construction of electricity poles and for the connection of electricity by Electricity Fiji Ltd.
- 10. Has the Defendant demonstrated a basis to enter or remain on the land in respect of which an order is sought by the Plaintiff?**
- 11.** In *ILTB v Webb & 7 Others* – Civil Action No HBC 271 of 2019, the Court noted;
- “ The second aspect of the defendant’s argument is that they are not trespassers. As the terms of the Order makes clear, a party wanting to take advantage of the summary procedure provided by Order 113 must show that the Defendants against whom the order for possession is sought had or have no basis to enter or remain on the land in respect of which the order is sought. It is much easier to do this if the plaintiff is*

² Affidavit in Opposition filed late on 15th August 2024.

able to explain the basis upon which the defendants came to be occupying the land, or on what basis they have been allowed to remain there prior to the application being made”

12. In **Webb** the Court did not sanction the use of Order 113 because it took the view that ILTB, as the Plaintiff, could not, on the evidence provided explain how people who had been living on the land for over 20 – 50 years, who had been paying or providing to the land owning unit some sort of rent or reward for their use of land, and allowed to carry out improvements be deemed trespassers who could be summarily evicted using the Order 113 process.
13. The Court must decide its case on its merit. In **Webb**, land occupancy over native reserve land took place with the endorsement of native landowners, so when ILTB was registered as the statutory lessor over the subject land, prior occupancy of the subject land was obvious, raising the issue as to the rationale of **ILTB** leasing the land to persons, other than the prior occupants.
14. The Court is of the view that this case can be clearly distinguished from that of **Webb** on the basis of the evidence deposed by Phul Mati and filed on 22nd April 2024 in support of the Originating Summons. It explains the basis upon which the Defendants have come onto the land, and this is generally, not contested by the Defendant³;
 - (i) Durga Prasad had been registered as an Executor and Trustee in the Estate of Gobardhan which includes the property described as CT No. 32228, Lot 1, DP No. 4257 situate in the District of Rewa, as of **17th September 1999**.⁴
 - (ii) The Defendant, Anwar Ali, along with other unnamed tenants have always been a tenant of the Plaintiff over the subject property premised on an unwritten annual tenancy agreement. Anwar Ali, himself, first became a tenant by purchasing the remainder of a tenancy held by one Eremasi Tasova in 2010,⁵ and remained at all relevant times, a tenant.
 - (iii) A **Notice to Quit and Vacate Possession** dated 23rd November 2023 was received by the Defendant, Anwar Ali giving him 30 days to vacate the subject property⁶. Receipt of this Notice has been acknowledged by the said Defendant.⁷

³ Affidavit of Anwar Ali filed on 15th August 2024

⁴ Annexure '**PM 2**' of Affidavit of Phul Mati filed on 22nd April 2024

⁵ See Annexure AA-1 of the Affidavit in Opposition of Anwar Ali filed on 15th August 2024

⁶ Annexure '**PM 3**' OF Affidavit of Phul Mati filed on 22nd April 2024

⁷ Paragraph 8(i)-(iv) Affidavit in Opposition of Anwar Ali filed on 15th August 2024

(iv) Despite receiving the Notice on 23rd November 2023, terminating the tenancy over **a year ago**, the Defendant remains in occupation on the said property without the license or consent of the Plaintiff.

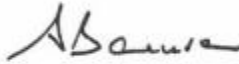
15. The Court is of the view that the Plaintiff has shown that the named Defendant, Anwar Ali, his family, tenants and other persons brought by him onto the subject land **CT 32228, Lot 1, DP No.4257 situate in the District of Rewa, in the island of Viti Levu** have no basis to enter or remain on the land after the expiry of the **Notice to Quit and Vacate Possession** dated 23rd November 2023.

ORDER:

A. Order in Terms of the Originating Summons (For Summary Possession of Land under Order 113 of the High Court Rules 1988 and section 169 of the Land Transfer Act 1971), granted;

- (i) The Plaintiff do recover possession of premises situated at Lot 9, Lokia, Nakaikogo, Nausori, property described as Certificate of Title No.32228 being Lot 1 on Deposited Plan No.4257, situated in the District of Rewa in the Island of Viti Levu, on the ground that she is entitled to possession and that the person in occupation are doing so without the license or consent of the Plaintiff.
- (ii) Costs summarily assessed at \$500.00 to be paid by the named Defendant Anwar Ali, within 21 days of the date of this Order.




Savenaca Banuve
Judge

At Suva
13th December 2024